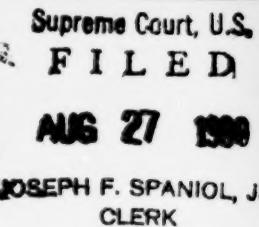


90-352 ①



No.

In the Supreme Court  
OF THE  
United States

OCTOBER TERM, 1990

SHARON NAVRATIL, individually and Guardian ad litem  
for SERENA NAVRATIL, a Minor,  
*Petitioners,*

vs.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION  
INTERINSURANCE BUREAU, a reciprocal insurance  
exchange,  
*Respondent.*

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT

---

THOMAS EDWARD WALL  
12063 Jefferson Boulevard  
Culver City, California 90230  
(213) 827-4452

*Counsel for Petitioners*

*Sharon Narratil, individually  
and as Guardian ad litem for  
Serena Narratil, a Minor.*



## **QUESTION PRESENTED FOR REVIEW**

1. Whether the California Supreme Court violated petitioners rights under the Equal Protection and Due Process Clauses of the United States Constitution when it declined to accept for review the lower State appellate court decision even though the California Supreme Court had accepted for review an earlier case which raised the identical issues raised in petitioner's case.

### **LIST OF PARTIES**

Petitioners are SHARON NAVRATIL, individually and as Guardian ad litem for SERENA NAVRATIL, a Minor.

Respondent is CALIFORNIA STATE AUTOMOBILE ASSOCIATION, INTER-INSURANCE BUREAU, a reciprocal insurance exchange.

Petitioner and Respondent are the same parties as in the proceedings below. JULIUS J. BARTHEL was and is a Defendant and Appellant in the proceedings below.

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CALIFORNIA STATE AUTOMOBILE ASSOCIATION  
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**PETITION FOR A WRIT OF CERTIORARI  
TO THE CALIFORNIA SUPREME COURT**

Sharon Navratil, individually and Guardian ad litem  
for Serena Navratil, a Minor, petition for a writ of  
certiorari to review the decision of the California Su-  
preme Court in this case.

**OPINIONS BELOW**

The opinion of the California Supreme Court denying  
review of the court of appeals decision (Appendix, *infra*)  
has not been reported as of this date.

## **JURISDICTION**

The opinion of the California Supreme Court denying review was issued on June 21, 1990. The order denying reconsideration of its order denying review was issued on July 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec.1247(3).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Fourteenth Amendment of the Constitution of the  
United States of America

## **STATEMENT OF THE CASE**

In this case, the minor, SERNA NAVRATIL was sexually molested in a house by the homeowner. The homeowner was insured by respondent under a homeowners insurance. The minor sued the homeowner for physical injuries resulting from the molestation.

The insurance company then brought the present action for declaratory relief contending it was not liable to provide coverage for injuries arising out of the molestation since it was an intentional act.

The trial court below agreed with the insurance company and granted its motion for summary judgment.

The minor therefore appealed to the California Court of Appeals for the First Appellate District.

Prior to a decision by the First Appellate District, the California Supreme Court granted review of two decisions which raised the same general issue of whether homeowners insurance covers injuries sustained by a minor who has been sexually molested by the homeowner. *State Farm Fire and Casualty Company v. Robin R.*, S 013639(1990); *J.C. Penney Casualty Insurance Company v. M.K.*, S010524 (1990).

The First Appellate District of California on April 3, 1990 issued its decision affirming the trial courts determination of non coverage.

The minor therefore petitioned the California Supreme Court on May 7, 1990 to review the Court of Appeals decision in light that it had already granted review in the above cases. Under Rules adopted by the California Supreme Court it could accept for hearing petitioner's case and order the action deferred until it decided the prior cases. If the Court ruled homeowners insurance did apply in such a situation the petitioner herein could receive the benefits of the above decisions.

On June 21, 1990 the California Supreme Court denied the petition for review. On July 11, 1990 the California Supreme Court denied the minor's request for reconsideration of its order denying review.

As of this date the California Supreme Court has not rendered its decision in either of the above decisions. If the California Supreme Court does eventually rule in the above cases that homeowners insurance does cover injuries to minors who have been sexually molested in the house by the homeowner, the petitioner herein will not benefit.

## REASONS FOR GRANTING THE WRIT

### I.

#### **WHILE A STATE IS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE APPELLATE REVIEW, WHEN IT ELECTS TO PROVIDE SUCH REVIEW IT MUST APPLY ITS RULES IN A NONDISCRIMINATORY MANNER.**

The case presents an opportunity, on a limited and undisputed record, for this Court to correct a violation of the United States Constitution by the State of California through its highest court. It is petitioners' contention the California Supreme Court acted in a discriminatory manner when it elected not to accept for hearing petitioners' case when it had already accepted for hearing an identical case.

#### **A. STANDARD OF REVIEW**

##### 1.

#### **A STATE IS NOT REQUIRED BY THE FEDERAL CONSTITUTION TO PROVIDE A RIGHT TO APPELLATE REVIEW.**

1. McKane v. Durston, 153 U.S. 684, 687-688 (1934)
2. Griffin v. Illinois, 351 U.S. 12, 18 (1955)

## 2.

**HOWEVER, IF THE STATE DOES ELECT TO PROVIDE APPELLATE REVIEW IT MUST DO SO CONSISTENT WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AND AVOID ACTING IN AN ARBITRARY OR UNREASONABLE MANNER.**

In *Griffin vs. Illinois (supra)* this Court was faced with the issue of whether a criminal defendant who was appealing his conviction had the right to a free transcript of the trial proceedings. The Court held the defendant does have this right.

The Court's reasoning was while the State did not have to provide appellate courts or a right to appellate review at all, if it did provide such review, it cannot discriminate and "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. (citations omitted). (351 U.S. at p. 18).

In *James v. Reese*, 546 Fed.2d 328 (9th Cir 1976) the appellate court citing *Griffin (supra)* held without an allegation of invidious discrimination petitioners due process argument was without merit.

## 3.

THE ISSUE BEFORE THIS COURT IS NOT WHETHER THE STANDARDS OF APPEAL ADOPTED BY THE STATE OF CALIFORNIA ARE REASONABLE BUT WHETHER SAID RULES WERE APPLIED IN A CONSTITUTIONAL ACCEPTABLE MANNER TO THE PETITIONER HEREIN.

Petitioner is not contending that the rules of appeal adopted by the State of California through the California Supreme Court are defective. Rather petitioner is contending that said rules were applied to her in a discriminatory manner.

## II.

THE CALIFORNIA SUPREME COURT DENIAL OF PETITIONER'S PETITION FOR REVIEW OF THE LOWER COURT DECISION WAS PERFORMED IN A DISCRIMINATORY MANNER IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

A. California Supreme Court Practice of Reviewing Lower Appellate Cases

## 4.

REVIEW BY THE CALIFORNIA SUPREME COURT OF APPELLATE DECISIONS IS PURELY DISCRETIONARY.

In *People v. Davis*, 147 Cal. 346, 81 P. 718 (1905) the court construed a California Constitutional Amendment which provided the California Supreme Court shall have appellate jurisdiction in all cases pending before a District Court of Appeals. (Const. Art 6 Sec. 4).

The high court held it did not have to review all cases decided by the District Court of Appeals but rather only those cases in its discretion it wished to consider. As the Court stated: "For it follows that the parties have no right to insist upon the exercise of this power (of review). They may petition for it, but the action of this court in any case is purely discretionary." See *Lawson v. Kolender*, 658 Fed. Rptr. 2d 1364 at f.n. (9th Cir 1981); J. Poulous and B. Verner, "Review of Intermediate Appellate Court Decisions in California, 15 Hastings L.J. 11, 15-16 (1963); Comment, To Hear or Not to Hear: A Question for the California Supreme Court, 3 Stanford L.Rev. 243, 266-267 (1951).

There are no reported decisions concerning the exercise of the Court's discretion.

## 5.

### THE CALIFORNIA SUPREME COURT HAS ADOPTED A STANDARD OF WHICH CASES IT WILL REVIEW.

Rule 29(a) California Rules of Court promulgated by the Judicial Council provides as follows:

#### Rule 29. Grounds for Review in Supreme Court

(a) [Grounds] Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Amended Nov. 11, 1966; May 6, 1985.

(b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

6.

**THE CALIFORNIA SUPREME COURT HAS FURTHER PROMULGATED RULES CONCERNING REVIEW OF CASES WHICH RAISES ISSUES ALREADY PRESENTED IN CASES ACCEPTED BY THE COURT**

Rule 29.2(c) California Rules of Court provides as follows:

(c) [Grant and Hold] After granting review of a decision of a Court of Appeal, the Supreme Court may order action on the cause deferred until disposition of another cause pending before the court.

Therefore if a case raises an issue that is present in another case which has been accepted for hearing, the California Supreme Court has the authority to accept for hearing the later case but refrain from deciding the case until the court disposes of the first case.

## 7.

**IF THE CALIFORNIA SUPREME COURT DECLINES TO REVIEW THE LOWER COURT DECISION, THE LOWER APPELLATE COURT DECISION IS BINDING ON THE PARTIES AND IS NOT SUBJECT TO REVIEW OR MODIFICATION AS A RESULT OF SUBSEQUENT DECISIONS BY THE CALIFORNIA SUPREME COURT.**

Upon denial of the petition for review, the judgment of the Court of Appeal is affirmed and binding on the parties. Rule 29.4(a) California Rules of Court.

The opinion of the Court of Appeals is not subject to further review or modification. See Witkin, 9 California Procedure 3d ed. Sec. 720 et. seq. p. 694.

**B. Effect of California Supreme Court Actions on Petitioner's Case**

## 8.

**THE CALIFORNIA SUPREME COURT BY DENYING THE PETITION FOR REVIEW IN PETITIONER'S CASE BUT ALLOWING IT IN OTHER CASES HAS DISCRIMINATED AGAINST THE PETITIONER IN VIOLATION OF THE CONSTITUTION.**

As a result of the California Supreme Court denial of petitioner's petition for review, petitioner's case is at an end.

If the California Supreme Court subsequently allows recovery in the State Farm and/or J.C. Penney Casualty Insurance Company cases (supra) petitioner herein will not benefit.

The California Supreme Court without any basis in fact has discriminated against the petitioner in violation of the Constitution. There is no logical reason why petitioner's petition for review was not granted.

### **CONCLUSION**

Petitioner has been the victim of one of the most horrible events which could happen to a minor. She now is a victim of the judicial process which was designed to protect her.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the order of the California Supreme Court denying review of the lower appellate court judgment.

DATED: August 22, 1990

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THOMAS EDWARD WALL  
*Counsel for Petitioners*





IN THE COURT OF APPEAL  
OF THE  
STATE OF CALIFORNIA

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FIRST APPELLATE DISTRICT,  
DIVISION THREE

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CALIFORNIA STATE AUTOMOBILE ASSOCIATION  
INTER-INSURANCE BUREAU,  
*Plaintiff and Respondent,*  
vs.  
JULIUS J. BARTHEL et al.,  
*Defendants and Appellants.*

---

Super. Ct. No. 54692  
Napa County

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I. Synopsis of Case

Appellant Sharon Navratil (Navratil), individually and as guardian ad litem of Serena Navratil, a minor (Serena), filed two personal injury actions against appellant Julius J. Barthel (Barthel) based on two alleged acts of child molestation committed by Barthel against Serena. Barthel previously had pled nolo contendere to criminal charges of two counts of violation of Penal Code section 288, subdivision (a), based upon the same acts alleged in the personal injury actions.

In response to the civil actions, Barthel made a claim for coverage, including a duty to defend, upon respondent California State Automobile Association, Inter-Insurance Bureau, a reciprocal insurance exchange (CSAA), under his homeowner's insurance policy issued by CSAA, and specifically section II, Coverage E thereof, which provided: "If a claim is made or a suit is brought against any *insured* for damages because of *personal injury* or *property damage* caused by an *occurrence* to which this coverage applies, we will: [¶] 1. pay up to our limit of liability for the damages for which the *insured* is legally liable; and [¶] 2. provide a defense at our expense . . ." The policy defined "occurrence" as "an accident, including exposure to conditions which results during the policy period in: [¶] a. *personal injury*; or [¶] b. *property damage*."

CSAA denied coverage under the policy, relying on an exclusionary clause for personal injury or property damage, "the type of which is expected or intended by the *insured* . . ." CSAA then filed the instant action against Barthel and Navratil, seeking a judicial declaration of noncoverage based upon the exclusionary clause as well as Insurance Code section 533 (insurer not liable for loss caused by insured's willful act).

CSAA subsequently moved for summary judgment. (Code Civ. Proc., § 437c.) The trial court granted summary judgment, declaring that the policy did not provide coverage for the acts or injuries alleged in the personal injury actions. In its statement of decision, the court ruled that (1) as a matter of law the acts of child molestation by Barthel did not constitute accidental "occurrence[s]" within the scope of coverage under the policy, because intentional acts are not accidental; (2) the acts of child molestation for which Barthel was convicted

under Penal Code section 288, subdivision (a), were excluded from coverage as a matter of law under *Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326; and (3) the evidence before the court, including Barthel's deposition testimony, established his acts were willfull and not accidental.

Barthel and Navratil appeal. We affirm.

## II.

### Pertinent Case Law and Discussion

*Allstate Ins. Co. v. Kim W.*, *supra*, 160 Cal.App.3d 326 is the leading appellate decision directly pertinent to the specific issues before us. In *Kim W.*, a minor filed a complaint through her guardian ad litem against Korte seeking damages for injuries resulting from several acts of sexual assult. Korte was insured under a homeowner's insurance policy which expressly excluded coverage for bodily injury or property damage "intentionally caused by an insured person." (*Id.*, at pp. 229-330.) The insurer brought an action for declaratory relief against both Korte and the minor, seeking a declaration that the policy provided no coverage to Korte for the acts alleged in the minor's complaint. (*Id.*, at p. 330.)

The insurer's complaint alleged that Korte had engaged in conduct constituting a violation of Penal Code section 288. The complaint referred to a criminal proceeding in which Korte had been charged with various sexual offenses against children. (*Allstate Ins. Co. v. Kim W.*, *supra*, 160 Cal.App.3d at p. 333, fn. 3.) Korte answered admitting that he had engaged in conduct which constituted a violation of Penal Code section 288. The trial court thereafter granted the insurer's motion for judgment on the pleadings. (*Id.*, at p. 30.)

On appeal, the court affirmed. The court rejected the argument that the insurer was not exonerated from liability under the policy because, though the act may have been willful, the resulting injury was not intended or expected. The court stated: “[U]nder certain circumstances, the nature of the intentional act of the insured is such that an intent to cause at least some harm can be inferred as a matter of law, and that as long as some harm is intended, it is immaterial that harm of a different magnitude from that contemplated actually resulted. [Citations.] We conclude that an act which constitutes a violation of Penal Code section 288 is such an act.” (*Allstate Ins. Co. v. Kim W.*, *supra*, 160 Cal. App.3d at p. 332.) The court accordingly found the injuries alleged in the minor’s complaint fell within the scope of the exclusionary clause of the policy.

*Kim W.* has been followed and affirmed in recent appellate decisions. (See, e.g., *Fire Insurance Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023-1024 [violation of Penal Code section 288 creates an inference of an intent to injure which may not be overcome by evidence of a subjective lack of intent to harm so as to avoid coverage exclusion].)

*J. C. Penney Casualty Ins. Co. v. M. K.* (1989) 209 Cal.App.3d 1208, cited by appellants, constitutes the sole California authority for their position that the insurance exclusion for intentional acts requires proof of a preconceived subjective intent to inflict harm, and that a violation of Penal Code section 288 does not necessarily give rise to an inference of such intent. Significantly, however, the California Supreme Court granted review of that decision (review granted July 26, 1989). That decision accordingly may no longer be relied upon as authority.

*Kim W.* and its progeny support the trial court's determination that the alleged injuries resulting from acts for which Barthel was convicted of violations of Penal Code section 288, subdivision (a), fell within the scope of the policy's exclusionary clause, as well as Insurance Code section 533, as a matter of law. The granting of summary judgment therefore did not constitute error.

III.

Disposition

The judgment is affirmed.

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Strankman, J.

We concur:

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White, P.J.

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Barry-Deal, J.

No: A043989

SUPREME COURT  
FILED  
MAY 7, 1990  
Robert Wandruff Clerk  
DEPUTY

IN THE  
SUPREME COURT OF CALIFORNIA  
CALIFORNIA STATE AUTOMOBILE ASSOCIATION  
INTER-INSURANCE BUREAU,  
*Plaintiff and Respondent,*  
vs.  
JULIUS J. BARTHEL,  
et al.,  
*Defendant and Appellants.*

ON REVIEW FROM THE COURT OF APPEAL FOR  
THE  
FIRST APPELLATE DISTRICT DIVISION THREE  
NAPA County NO. 54692

---

PETITION FOR REVIEW

---

LAW OFFICES OF  
THOMAS EDWARD WALL  
12063 Jefferson Boulevard  
Culver City, California 90230  
(213) 827-4452  
*Attorney for Appellant*  
*Sharon Navratil*

No: A043989

IN THE  
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LAW OFFICES OF  
THOMAS EDWARD WALL  
12063 Jefferson Boulevard  
Culver City, California 90230  
(213) 827-4452  
*Attorney for Appellant*  
*Sharon Navratil*

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IN THE  
SUPREME COURT OF CALIFORNIA  
CALIFORNIA STATE AUTOMOBILE ASSOCIATION  
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et al.,  
*Defendants and Appellants.*

NAPA COUNTY NO. 54692

---

PETITION FOR REVIEW

---

**TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:**

REASON FOR REVIEW

This action involves the issue of whether a homeowner's insurance policy will cover personal injuries resulting from the sexual molestation of a minor. The trial court following *Allstate v. Kim*, 160 Cal.App. 3d 326 (1984) held coverage did not apply. The appellate court affirmed the judgment.

This Court has accepted for review a similar case, *J.C. Penney Casualty Insurance Company v. M.K.*, 209 Cal.App. 3d 1208 (accepted for hearing on July 24, 1989). To ensure uniformity of decisions it is necessary for this Court to grant review of the present case.

## ISSUES ON APPEAL

When a defendant pleads guilty to *Penal Code* Section 288, is the act of touching the minor a wilful act as a matter of law within the meaning of *Insurance Code* Section 533 or is the subjective intent of the defendant taken into consideration?

## STATEMENT OF FACTS

On August 2 and August 3, 1986 the minor, SERENA NAVRATIL, was visiting defendant JULIUS J. BARTHEL'S home.

While at the house there were two separate touchings of the minor by Mr. Barthel.

On August 2, 1986 Mr. Barthel kissed and touched the minor and accidentally touched her breasts. Mr. Barthel testified in his deposition that the kiss and hugging was done because he felt Serena needed affection since her parents had gone through a separation. Mr. Barthel further testified he did not see the minor's breasts nor did he touch the breasts for sexual gratification.

The second touching occurred on August 3, 1986. It is stipulated by the parties the homeowner's policy would not cover the second touching.

Mr. Barthel pleaded nolo contendere to a violation of Section 288a *Penal Code* based on both touchings.

At the time of the incidents Mr. Barthel had homeowner's insurance issued by the appellant. The insurance policy was in full force and effect at the time of the touching.

## PROCEDURAL HISTORY

On October 21, 1987 Respondent filed a complaint for declaratory relief based on a complaint filed by appellants against their insured, Barthel. Appellants' complaint was based on negligence and other causes of action arising out of the touchings.

An answer to Respondent's complaint was filed contending the homeowner's coverage did apply.

On June 30, 1988 Respondent filed its motion for summary judgment. The appellants filed a counter summary judgment motion. Both motions involved whether the policy applied.

On September 1, 1988 the trial court granted Respondent's motion holding coverage did not apply. A notice of appeal was timely filed.

Briefs were filed with the appellate court and oral argument was presented to the court of appeals.

On April 3, 1990 the Court of Appeals issued its opinion affirming the trial court's decision.

## LEGAL DISCUSSION

### Introduction

This discussion is limited to the application of *Allstate v. Kim*, 160 Cal.App.3d 326 (1984). If the court wishes a full briefing on the other issues raised in this action, same will be provided.

1.

CONDUCT WHICH IS IN VIOLATION OF SECTION 288 OF THE *PENAL CODE* HAS BEEN HELD BY KIM v. ALLSTATE AS A WILFUL ACT WITHIN THE MEANING OF *INSURANCE CODE* SECTION 533 AS A MATTER OF LAW.

In *Allstate v. Kim*, 160 Cal.App.3d 326, 206 Cal.Rptr. 609 (1984) the court held, "an act which is in violation of *Penal Code* Section 288 is a wilful act within the meaning of *Insurance Code* Section 533." (160 Cal.App.3d 326 at p. 333).

The reasoning of the *KIM* court was that the nature of the conduct in violating Section 288 is such that the intent to cause at least some harm can be inferred as matter of law regardless of whether the harm actually occurred.

The *KIM* reasoning is unique in that instead of examining the facts of each particular act as would be required under the general rules in interpreting Section 533 and determining on a case by case basis whether the insured had a preconceived design to cause the damage, *KIM* held as a matter of law, conduct in violation of Section 288 per se falls under Section 533. This "strict liability" approach has been criticized by other courts. See *STATE FARM v. MCINTYRE*, 652 Fed. Supp. 177 (N.D. Ala. 1977) (holding that Alabama law would not allow the intent to be inferred as a matter of law).

Further, as explained *supra*, the *KIM* decision has to be read very carefully. The case should only apply to a very limited factual situation.

## 2.

UNDER *KIM* THE FACT THAT MR. BARTHEL PLEADED NOLO CONTENDERE TO SECTION 288 OF THE *PENAL CODE* IS IRRELEVANT TO THE ISSUE OF INSURANCE COVERAGE.

In *KIM*, the defendant pleaded guilty to one offense against one child but the other alleged offenses were dismissed. The *KIM* court held this fact was irrelevant.

As the *KIM* court held, "whether or not he has actually been convicted of such offenses is irrelevant for purposes of these appeals." (160 Cal.App.3d at p. 333 at f.n. 3).

Rather, the *KIM* court stated the approach is to look at the "act" itself and determine whether it is a violation of *Penal Code* Section 288. If the "act" is determined to be a violation of the *Penal Code*, the "act" is a wilful act causing coverage to be denied under Section 533.

Therefore the fact that Mr. Barthel pleaded nolo contendere to violations of *Penal Code* Section 288 is irrelevant to the issue of whether coverage should apply. The proper approach was for the trier of fact to make its own determination whether the acts themselves violated the *Penal Code*.

## 3.

THE ACTS OF MR. BARTHEL WHICH WERE COMMITTED ON AUGUST 02, 1986 RAISE A TRIABLE ISSUE OF FACT WHETHER THEY ACTUALLY ARE IN VIOLATION OF *PENAL CODE* SECTION 288.

To be found guilty of Section 288 of the *Penal Code* the prosecution must prove three items beyond a reasonable doubt:

- (1) The defendant committed a lewd act;
- (2) On a child under the age of 14; and
- (3) The defendant had the intent to arouse or gratify the lust of either party when he committed the act.  
*People v. Nothangel*, 187 Cal.App.2d 219, 225.

As to the acts committed on August 02, 1986 while arguably the first two elements were present (while it is certainly doubtful whether the hugging constitutes a "lewd act") the required element of "intent" is subject to severe dispute.

The intent required under Section 288 is a "specific intent" which must be proved beyond a reasonable doubt. See *People v. Worthington*, 38 Cal.App.3d 359, 113 Cal.Rptr. 322 (1974).

As documented in the deposition of Mr. Barthel, he testified he had no intent to sexually arouse either himself or the minor by his acts of August 02, 1986. His only expressed intent was to show affection to the minor who had recently experienced the tragedy of her parents going through a separation.

There was a severe issue of fact whether the touching of August 02, 1986 amounted to a violation of Section 288.

4.

SINCE CONVICTION OF *PENAL CODE SECTION 288*  
IS NOT CONCLUSIVE AND THERE HAS BEEN  
NO CIVIL ADMISSION, THE KIM DECISION HAS  
NO APPLICATION TO THE CASE AT BAR.

As explained *supra*, the fact that Mr. Barthel pleaded nolo contendere to a violation of Section 288a of the *Penal Code* is not conclusive on the issue of intent.

In *KIM* the court had little problem in coming to the conclusion that the defendant violated the *Penal Code* since the defendant civilly admitted the violation. In the case at bar Mr. Barthel has not made such an admission. In fact in his First Affirmative Defense to the declaratory relief action Mr. Barthel stated he is liable to the minor because of his "negligent acts".

### CONCLUSION

Sexual molestation of children is an issue now receiving major interest from the public. The courts are trying to grapple with the apparent conflict in "the public strong interest in the compensation of victims" (See *Congregation of Rodef Shalom v. Am. Motorist Co.*, 91 Cal.App.3d 690 (1970) and the principle codified in *Civil Code* Section 3517 that "no one can take advantage of his own wrong." This conflict has caused a divergence among the appellate divisions in this State as well as a divergence in the Federal Courts and between the states themselves.

The appellants herein are not seeking coverage simply because of the nature of the act or the age of the victim. What they are seeking and what they deserve is an opportunity for a trier of fact to make the crucial decision of the intent of the offender when he committed the act. If the evidence supports Mr. Barthel's own deposition testimony that he did not have the specific intent required under Section 288a the appellants are entitled to be compensated for the severe injuries incurred. If the evidence proves otherwise appellant's recourse is in the criminal courts.

DATED: May 04, 1990

(SIG)

THOMAS EDWARD WALL

SUPREME COURT FILED  
JUNE 21 1990  
Robert Wandruff Clerk

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DEPUTY

ORDER DENYING REVIEW  
AFTER JUDGMENT BY THE COURT OF APPEAL  
First Appellate District, Division Three, No. A043989  
S015437  
IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA  
IN BANK

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CALIFORNIA STATE AUTOMOBILE ASSOCIATION  
INTER-INSURANCE,  
*Respondent,*

vs.

JULIUS J. BARTHEL Et Al.,  
*Appellants.*

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Appellant's petition for review DENIED.

PANELLI  
Acting Chief Justice

Supreme Court of California  
San Francisco, California

ROBERT F. WANDRUFF

Court Administrator and Clerk of the Supreme Court

July 11, 1990

Thomas Edward Wall, Esq.  
12063 W. Jefferson Blvd.  
Culver City, CA 90230

Re: S015437 — CSAA v. Barthel

Dear Mr. Wall:

The Court has read and considered your letter dated July 2, 1990. I have been directed to inform you that the order filed June 21, 1990 is correct and the matter will not be reconsidered.

Very truly yours,

ROBERT F. WANDRUFF  
Court Administrator and  
Clerk of the Supreme Court

By: John C. Rossi  
Assistant Clerk-  
Administrator

JCR:sf

cc: Stephen S. Harper

